No. 92-1899

Supreme Court, U.S.
FILED
MAY 11 1993
OFFICE OF THE CLERK

In the
Supreme Court of the United States.

MAY TERM, 1993.

PETER AND DIANE KOKARAS,
Petitioners,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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105 pp

Questions Presented.

1. Did the First Circuit Court of Appeals err in requiring a more stringent standard than other circuits to satisfy the notice requirements under the provisions of 28 U.S.C. § 2675 (Federal Tort Claims Act [FTCA]) in order to confer jurisdiction on the United States District Court to hear a Federal Tort Claims Act action.

2. Did the First Circuit Court of Appeals establish an unacceptable standard for compliance with the notice requirements under the provisions of 28 U.S.C. § 2675(a) (Federal Tort Claims Act [FTCA]) before jurisdiction can be conferred on a United States District Court to adjudicate a Federal Tort Claims Act claim thus imposing an unreasonable departure from the usual course of judicial proceedings as to call for the

exercise of this Court's power of supervision.

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v

No. - .

In the

Supreme Court of the United States.

May Term, 1993.

PETER AND DIANE KOKARAS,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

Opinions Below.

The opinion of the First Circuit Court of Appeals (infra at 4a) is reported at 980 F.2d 20 (1st Cir. 1992). The opinions of the United States District Court for the District of New Hampshire (infra at 22a) are reported at 750 F. Supp. 542 for opinion dated November 7, 1990 and 791 F. Supp. 35 for opinion dated April 23, 1992.

Jurisdiction.

The judgment of the Court of Appeals (infra at 1a) was entered on November 23, 1992. A petition for rehearing was denied on February 23, 1993 (infra at 20a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved.

28 U.S.C. § 1254(1) provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1346(b) provides:

> (b) Subject to the provisions of chapter 171 of this title [28 USCS §§

2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2675(a) and (b) provide:

> (a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The

provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

> (b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

28 U.S.C. § 2401(b) provides:

> (b) [A] tort claim against the United States shall be forever barred unless it is presented in writing to the

appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Regulations

28 C.F.R. § 14.2 provides:

(a) For purposes of the provisions of 28 U.S.C. 240(b), 2672 and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death

alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

MISCELLANEOUS

S. Rep. No. 1327, 89th Cong. 2d Sess., reprinted in 1966 U.S. Code Cong. & Admin. News 2515 - 2516 provides:

The Committee on the Judiciary to which was referred the bill (H.R. 13650) to amend the Federal Tort Claims Act to authorize increased agency consideration of tort claims against the Government, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends

that the bill do pass.

PURPOSE

The purpose of the bill is to provide authority to the heads of Federal agencies for administrative settlement of tort claims against the United States. Settlements for more than $25,000 must have the prior written approval of the Attorney General or his designee. A claim would have to be filed with the agency concerned within 2 years after it accrues and any tort action must be brought within 6 months after final denial of the administrative claim. The bill would increase the limits for attorneys' fees in cases of administrative settlement from 10 to 20 percent and from 20 to 25 percent of amounts paid after suit is begun.

STATEMENT

A similar Senate bill, S. 3162, was introduced by Senator Sam J. Ervin, Jr. In its favorable report on the bill the Committee on the Judiciary of the House of Representative said: The bill, H.R. 13650, is one of a group of three bills introduced in accordance with the recommendations of an executive communication transmitted to the Congress by the Department of Justice. The committee has considered these bills along with the bill H.R. 14182, providing for the award of costs in litigation involving the Government. These four bills have the common purpose of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or an involved in litigation

with their Government. This bill, H.R. 13650, with the two bills, H.R. 13651 and H.R. 13652, also introduced as recommended by the Department of Justice, are intended to improve the disposition of monetary claims by and against the Government. These are the matters which now comprise the bulk of civil litigation involving the Government. The proposals embodied in H.R. 13650 are intended to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States. In accomplishing these purposes, the more expeditions procedures provided by this bill will have the effect of reducing the number of pending claims which may

become stale and long delayed because of the extended time required for their consideration. The committee observes that the improvements contemplated by the bill would not only benefit private litigants, but would also be beneficial to the courts, the agencies and the Department of Justice itself. The Federal Tort Claims Act passed in 1946 made it possible for a person injured through the negligence or wrongful act of a Government employee to file suit against the United States for damages resulting from the injury when the employee was acting within the scope of his employment. The codified provisions of that act now contained in title 28 of the United States Code provide for administrative settlement only in cases where the claim is for $2,500 or less.

For claims over that amount, the individual has no alternative but to file suit. At a hearing conducted with reference to this bill on April 6, 1966, the Department of Justice presented testimony which included statistics which underscore the need for procedures which will permit early settlement of tort cases. At the hearing, it was noted that thousands of suits have been filed under this act and each year the Government pays out millions of dollars to persons who have brought suit against the United States. At that hearing, it was pointed out that a large number of cases are settled prior to trial. In the fiscal year 1965, the Department of Justice settled 731 tort cases after suit had been instituted. The claims in these cases total $24 million, while the

cases were settled for a total of $6 million. Where the cases resulted in judgment against the Government, the record for the same year showed that there were 169 judgments which totaled approximately $4 million. The original claims as to these 169 cases totaled almost $24 million. Therefore, it is established that of meritorious claims filed against the Government under the tort claims provisions of title 28, about 80 percent are settled prior to actual trial..."

Statement of the Case.

The instant action was brought in the United States District Court for the District of New Hampshire as a result of an accident which occurred on May 8, 1987 in Hampton, New Hampshire between the Plaintiffs' motor vehicle and a motor vehicle owned by the United States Postal Service. As a result of said collision, the Plaintiffs suffered personal injuries, as well as property damage to the Plaintiffs' automobile. The Plaintiffs, pursuant to the requirements of the Federal Tort Claims Act (FTCA) 28 U.S.C. § 2675(a) filed a Standard Form "SF" 95 with the Hampton, New Hampshire Postal Service on June 2, 1987, 24 days after the collision. The Plaintiffs attached to said "SF" 95 copies of the automobile repair estimate, as well as copies of medical reports and medical

bills incurred by the Plaintiffs up to that date. The Plaintiffs stated in the box indicating property damage the amount of $2,906.61. In the space provided for personal injuries, the Plaintiffs wrote "to be determined". In the box in which the total amount of Plaintiffs' claim was to be entered, the Plaintiffs left it blank.

Subsequently, between the date of the filing of "SF" 95 on June 2, 1987 and May 3, 1989, additional medical records and medical bills were supplied to the Postal Service, either directly by the Plaintiffs or through their attorney at that time, Alfred J. Cirome. In addition, by letter from the Hampton, NH Postmaster dated May 3, 1988 addressed to the Plaintiffs' attorney, Mr. Cirome, it was stated that all estimates and bills associated with the May 8, 1987 accident giving rise to the above complaint

were turned over to a postal investigator, and that the postal investigator had met with Mr. Kokaras on several occasions in attempts to resolve the case. Further, on May 5, 1989, Attorney Alfred J. Cirome supplied to Mr. Henry J. Dumont, Postal Service Investigator additional medical bills and medical records of the Plaintiffs. Attorney Alfred J. Cirome was advised by Mr. Dumont that all necessary forms, regarding property damage to the motor vehicle and injuries to Peter and Diane Kokaras had been completed. Attorney Cirome also had a number of phone conferences, as well as personal conferences with Henry J. Dumont regarding the Plaintiffs' personal injury claims. The submission of the additional medical bills and reports to Mr. Dumont by Attorney Alfred J. Cirome on or about May 5, 1989 renders such additional records part of the

submission under the notice requirements of the administrative claim within two years of the accident.

The "SF" 95 in use at the time that Mr. and Mrs. Kokaras filed the original claim with the Hampton, New Hampshire Postal Service on June 2, 1987, nowhere contained any instructions advising a claimant that if a sum certain was not set forth with regard to personal injuries in the box provided, as well as the total amount of the claim in the box provided, that such claim could be rejected. Further, the government did not notify Mr. and Mrs. Kokaras that the "sum certain" requirement was not met until it sent a letter to the Plaintiffs dated July 30, 1990, approximately four months after the complaint instituting the above-entitled matter was filed with the United States District Court for the District of New

Hampshire and after the two-year statutory period for filing of claims had expired. Immediately upon receipt of said notice denying Plaintiffs' claim, Plaintiffs filed a new "SF" 95 form setting forth damages in the aggregate sum certain of $500,000.

The new "SF" 95 supplied to the Plaintiffs in August of 1990 contained instructions and warnings regarding failure to put a "sum certain" in the personal injury and total claim boxes. The Defendant filed a Motion to Dismiss, or in the Alternative, for Summary Judgment claiming lack of subject matter jurisdiction by the federal court to entertain the Plaintiffs' suit against the United States under the FTCA on the basis that the Plaintiffs had failed to comply with the provisions of 28 USC § 2675(a) as the claim for personal injuries was not stated in a "sum certain" under the provisions of 28

C.F.R. § 14.2(a).

On November 7, 1990, the United States District Court for the District of New Hampshire, Stahl, J., denied the Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment, citing as the court's rationale for the denial of the Defendant's Motion to Dismiss, or in the Alternative for Summary Judgment, the varying degrees of liberality with which the various circuits construed presentation requirements under 28 USC § 2675. (Emphasis added)

The Defendant then filed a Motion to Reduce Ad Damnum to Amount in Administrative Claim. While the Defendant's Motion to Reduce Ad Damnum to amount claimed in Plaintiff's Administrative Claim was pending, the First Circuit Court of Appeals rendered its decision in the case of Corte-Real v. United States, 949 F.2d 484 (First Cir.

1991). The United States District Court for the District of New Hampshire, Stahl, Jr., on the basis of the Corte-Real decision, supra, raised the issue sua sponte with regard to the District Court's subject matter jurisdiction in the above matter and reversed its ruling and granted the Defendant's Motion to Dismiss for lack of subject matter jurisdiction.

Upon appeal, the First Circuit Court of Appeals affirmed in part, reversed in part, and remanded for further proceedings holding that compliance with the notice requirements regarding the property damage claim were complied with but the notice requirements for the personal injury claims were not complied with.

Reasons for Granting the Petition

The United States Circuit Court of Appeals for the First Circuit has rendered a decision

in the instant case which is in conflict with the decisions of the Fifth, Sixth, Seventh and D.C. Circuits of the United States Court of Appeals with regard to what constitutes compliance with the notice requirements of 28 U.S.C. § 2675(a) in order to confer jurisdiction on a United States District Court to adjudicate a private citizen's claim against the government under the Federal Tort Claims Act. The First Circuit Court of Appeals in the instant matter has imposed very strict criteria for compliance with such notice requirements which is clearly in conflict with opinions of the Fifth, Six, Seventh and D.C. Circuits regarding notice requirements under the same or similar facts. The Fifth, Six, Seventh and D.C. Circuit Courts of Appeal have liberally interpreted the notice requirements under the FTCA which is in accordance with the legislative intent

and the legislative history at the time of the enactment of the amendments to the Federal Tort Claims Act in effect at the time that the Plaintiffs were injured in the instant matter.

I. THE FIRST CIRCUIT COURT OF APPEALS WAS IN ERROR IN REQUIRING A MORE STRINGENT STANDARD THAN OTHER CIRCUITS TO SATISFY THE NOTICE REQUIREMENTS UNDER THE PROVISIONS OF 28 U.S.C. § 2675 (FEDERAL TORT CLAIMS ACT [FTCA]) IN ORDER TO CONFER JURISDICTION ON THE UNITED STATES DISTRICT COURT TO HEAR A FEDERAL TORT CLAIMS ACT ACTION.

Under the Federal Tort Claims Act (FTCA), 28 USC § 2675(a), claimants must exhaust the appropriate administrative remedies before instituting suit in the United States District Court. See Statutory Provisions, supra at page vii.

The provisions of 28 C.F.R. § 14.2(a) sets

forth the procedure to be followed in filing a claim under 28 U.S.C. § 2675(a). See Regulations, supra at page x.

Relevant legislative history supports a liberal construction of the exhaustion requirement under the provisions of 28 U.S.C. § 2675(a). See Miscellaneous, supra at page xi.

The dominant theme of § 2675(a), therefore, is to apprise the agency involved in the activity which gave rise to the claim so that a fair settlement can be effectuated if warranted. See GAF Corp. v. United States, supra at 919 (D.C. Cir. 1987)("Congress repeatedly characterized presentment as a simple requirement of notice.") In Lopez v. United States, 758 F.2d 806 (First Cir. 1985), the First Circuit stated, "The claims process is meant largely to furnish notice to the government

sufficient to allow it to investigate the alleged negligent episode to determine if settlement would be in the best interests of all." Id. at 810. The FTCA is "intended to provide a framework conducive to the administrative settlement of claims, not to provide a basis for a regulatory checklist which, when not fully observed, permits the termination of claims regardless of their merits." The primary purpose of the amendments was to benefit claimants seeking relief from the government, but with resulting collateral benefits as well as underscored by the senate committee's observation that the bill would not only benefit private litigants but would also be beneficial to the courts, the agencies and the Department of Justice itself. Leg. Hist., supra at 2516. See Miscellaneous, supra at xi. See also Erxleben v. United

States, 668 F.2d 268, 273 (7th Cir. 1981).

The various circuits are in conflict as to whether or not the notice provisions of 28 U.S.C. § 2675(a) must be strictly construed. The court held in Molinar v. United States, 515 F.2d 246 (5th Cir. 1975) with regard to facts identical to those in the instant action that there was sufficient compliance with the requirements of 28 U.S.C. § 2675(a) to grant the court subject matter jurisdiction. In Williams v. United States, 693 F.2d 555 (5th Cir. 1983), the plaintiff did not indicate any amount sought for personal injuries or a total amount claimed on "SF" 95. Id. at 556. However, since the plaintiff's attorney sent a letter to the Postal Service detailing the personal injury and property damages sought by the plaintiff, the court held that the notice requirements of the FTCA were fulfilled. Id. The

Williams court refused to dismiss the action even though the attorney's letter was sent after the two-year statute of limitations had run. Id.. In accord, Knapp v. United States, 844 F.2d 376, 379 (6th Cir. 1988)(a claimant who fails to comply with the presentment regulations loses the opportunity to settle outside the courts, not the right to sue).

In Gaf Corp. v. United States, supra at page 919 (DC Circuit 1987) the court held that the dominant theme of § 2675(a) of the FTCA is to apprise the agency involved in the activity which gave rise to the claim so that settlement can be effectuated if warranted. The Court stated that, "Congress repeatedly characterized presentment as a simple requirement of notice."

In the instant case, the Plaintiffs never were notified by the Postal Service or any

person acting in its behalf that the original "SF" 95 was deficient for failure to request a "sum certain" in damages for their personal injuries until its letter dated July 30, 1990 after the Defendant's Motion to Dismiss or, In the Alternative, for Summary Judgment had been filed with the U.S. District Court for the District of New Hampshire. At no time was the original "SF" 95 and the supporting documentation returned to the Plaintiffs. "SF" 95 as submitted by the Plaintiffs should not be considered as not in compliance with the "sum certain" requirements when the defect was not called to the Plaintiffs' attention within two years of the accident. The submission of "SF" 95 without a sum certain in damages, but with supporting documentation, which was never returned to the Plaintiffs and no defects were called to the Claimants' attention within two years of

the Plaintiffs' accident, compliance by the Plaintiffs with 28 U.S.C. § 2675(a) should be considered sufficient. This is further buttressed in the instant action by the following:

(1) Additional documentation in the nature of medical records and medical bills were supplied to the Postal Service within the two-year period from the date of the original accident through Plaintiffs' counsel.

(2) A representative of the Postal Service advised Plaintiffs' counsel that all forms were, in fact, properly completed.

(3) Interview of Plaintiff by investigating postal employee with regard to said injuries.

The filing of "SF" 95, together with copies of bills and reports indicating the extent of the injuries to the Plaintiffs,

within the two-year period following the accident, gave the Postal Service ample notice of the Plaintiffs' personal injury claims arising from the occurrence, the nature of the claims and of the medical bills arising from those claims. The government, therefore, had at that point, sufficient information to make an investigation to determine if the Postal Service was at fault, to deny the claim if it concluded that the Postal Service was not at fault, and to enter into settlement negotiations if it concluded that the Postal Service was legally liable.

If it is construed that the filing of medical bills and medical reports does not comply with the notice requirements of 28 U.S.C. § 2675(a), the defect is cured after notice of the defect by the filing of an amended administrative claim form "SF" 95 after the two-year notice period has run,

which the Plaintiffs, in fact, have done.

To grant the Government's Motion to Dismiss or, In the Alternative, for Summary Judgment, on the ground that the Plaintiffs failed to submit a demand for a sum certain in damages, would work a grave injustice, elevate form over substance, and subvert the beneficial purposes of 28 U.S.C. § 2675(a). The failure of the Plaintiffs to specify to the Postal Service the specific amount of money they sought for their injuries on "SF" 95 when originally filed caused no prejudice to the government and did not preclude or hinder pretrial settlement nor further congest the Court's docket with unnecessary litigation. As stated hereinabove, the filing of "SF" 95 and the supplying of medical bills and reports on two separate occasions is sufficient compliance with the notice prerequisites of 28 U.S.C. § 2675(a)

to confer jurisdiction on the United States District Court.

Since the policy behind the filing and completion of "SF" 95 is to give the appropriate federal administrative agency a chance to consider the claim and to settle the claim without litigation, it should not be necessary to submit a claim that is technically perfect.

In the action of Molinar v. United States, supra, the attorney for the Plaintiff wrote a letter to the appropriate federal agency making a demand for property damage and personal injury enclosing medical bills and repair estimates, but making no specific claim in the letter for an amount of damages in dollars. In that action, no "SF" 95 was filed at all by Plaintiff or Plaintiff's counsel. Nevertheless, the court held that the Plaintiff had complied with the procedure

set forth in 28 U.S.C. § 2675(a). The court stated that "SF" 95 nowhere states that the claimant must make a claim for a sum certain, which is also true with regard to the original "SF" 95 supplied to the Plaintiffs. The form, however, is the standard vehicle by which the government reviews claims. The court stated in Molinar, supra at page 249, that the deficiencies in the form were such that the court considered the original claim as one for a sum certain because of the bills attached holding that the initial letter and attachments constituted a claim sufficient to toll the statute of limitations in 28 U.S.C. § 2401(b) and affirmed the district court's action in overruling the government's motion to dismiss.

In the instant case, the facts are even stronger in favor of the Plaintiffs than in Molinar, supra, since a "SF" 95 was

submitted, together with attachments for medical bills and property damages, which were later supplemented by further medical bills and medical reports.

If the defect is not called to the claimant's attention, this is sufficient reason to allow the claim and to either allow a claimant to perfect the claim by taking care of technical defects or excused for failure of the government to have the defects called to the claimant's attention.

In Erxleben v. United States, supra at 273, the Court held that, "The Federal Tort Claims Act is intended to provide a framework conducive to the administrative settlement of claims, not to provide a basis for a regulatory checklist which, when not fully observed, permits the termination of claims regardless of their merits." Such a doctrine is especially applicable in the instant

action since in none of the cases cited were any of the claimants initially advised by the Postal Service that everything was complete.

It is axiomatic that courts were established to provide a forum for the just handling of disputes, not as a forum for finding technicalities to avoid or decline to provide such a forum to resolve disputes between litigants when to do so would result in injustice.

In sum, it was error on the part of the First Circuit to so rigidly construe the requirements necessary to satisfy the notice provisions of 28 U.S.C. § 2675(a) in order to confer jurisdiction on a United States District Court to hear a Federal Tort Claims Action contrary to the holdings in other circuit courts of appeals; namely, the Fifth, Six, Seventh and District of Columbia Circuits, and further contrary to the purpose

of the amendments to the Federal Tort Claims Act as more particularly set forth in the legislative history. See Miscellaneous, supra, at page xi.

II. THE FIRST CIRCUIT COURT OF APPEALS BY ESTABLISHING AN UNACCEPTABLE STANDARD FOR COMPLIANCE WITH THE NOTICE REQUIREMENTS UNDER THE PROVISIONS OF 28 U.S.C. § 2675(a)(FEDERAL TORT CLAIMS ACT[FTCA]) BEFORE JURISDICTION CAN BE CONFERRED ON A UNITED STATES DISTRICT COURT TO ADJUDICATE AN FTCA CLAIM IMPOSES AN UNREASONABLE DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Under the more liberal standard of review as enunciated by the Fifth, Sixth, Seventh, and D.C. Circuits, the Plaintiffs in the instant action clearly have complied with the notice requirements under the Federal Tort

Claims Act as intended by Congress. The First Circuit Court of Appeals, therefore, so far departed from the accepted and usual course of judicial proceedings with regard to the prerequisites for conferring jurisdiction on a United States district court to hear a Federal Tort Claims Act action as to call for an exercise of this Court's power of supervision. The First Circuit Court of Appeals in the instant matter has misapprehended and overlooked the purpose and salutary effect which the FTCA Amendments were designed to accomplish as hereinabove set forth; namely, to provide "fair and equitable treatment of private individuals and claimants when they deal with the government or are involved in litigation with the government" (1966 U.S. Code Cong. at Admin. News) See Miscellaneous, supra at page xi. That the failure of the First Circuit

Court of Appeals to consider the decisions of the Fifth, Sixth, Seventh and D.C. Circuits and to instead demand stringent procedures for satisfying the notice requirements under the Federal Tort Claims Act, contrary to the legislative purpose for the passage of the amendments to such act, is such a departure from the accepted and usual course of judicial proceedings and further results in the sanctioning by the United States District Court for the District of New Hampshire for such a departure as to call for the exercise of this Court's power of supervision.

The Fifth, Six, Seventh and D.C. Circuits' decisions have held in factual situations identical to or similar to the facts in the instant matter that there was sufficient compliance with the notice requirements in a FTCA claim to grant the

U.S. District Court jurisdiction to adjudicate such claim under the Federal Tort Claims Act. The First Circuit Court of Appeals has failed to apply the applicable law with regard to the determination of the sufficiency of the compliance with the notice requirements of the Federal Tort Claims Act as follows:

(A) Failure to take into consideration the fact that the Plaintiffs received no notice of any defects in the "SF" 95 claim form originally filed by the Plaintiffs with the United States Postal Service until July 30, 1990, more than 37 months after the original "SF" 95 claim form was filed and more than 14 months after the two-year filing period had expired.

(B) That the Plaintiffs upon receipt of the notice of the claim defects in the "SF" 95 claim form originally filed, immediately

refiled an amended "SF" 95 claim form with a sum certain for the personal injuries set forth.

(C) The original "SF" 95 claim form contained no instructions whatsoever to a claimant that if a sum certain was not set forth in the personal injury and total claim boxes, that this failure could be fatal to the Plaintiffs' claims thus duping a claimant into a false sense of security, once again contrary to the clear legislative intent as set forth in the legislative history hereinabove referred to.

The failure to have proper instructions for filling out the "SF" 95 claim form and the failure to notify a claimant within the two-year period after the filing of an "SF" 95 of the defects in a claimant's claim form is tantamount to "entrapment" whereby a claimant is victimized by the government's

failure to provide adequate instructions to the claimant with said "SF" 95 form or, in the alternative, to be notified of the deficiency in the completed form within the two-year filing period. As stated, the new "SF" 95 now includes instructions printed on the back of said form advising claimants that a sum certain must be filled in in the property damage, personal injury, and total claim boxes in order for the claim to be considered validly made. This is tantamount to an admission on the part of the Defendant of the deficiency in the old "SF" 95 as there were no instructions for proper completion. Plaintiffs' failure to specify to the United States Postal Service in the instant matter on the original "SF" 95 the specific sum of money the Plaintiffs sought for their personal injuries caused no prejudice to the government nor did it preclude or hinder

pretrial settlement nor further congest the court docket with "unnecessary" litigation.

Due to the substantial departure from the accepted and usual course of judicial proceedings by the First Circuit Cour of Appeals with what constitutes compliance with the notice requirements in order to institute a Federal Tort Claims Act action in the United States District Court and the sanctioning of such a departure by a lower court by the First Circuit Court of Appeals in its decision in the instant matter calls for the exercise of this Court's power of supervision to establish a uniform standard to be applied to the various circuits for compliance with the notice requirements under 28 U.S.C. § 2675(a)(Federal Tort Claims Act[FTCA]).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX

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Order of U.S. District Court for District of New Hampshire (11-7-90)	42a

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 92-1616

1992	
Nov. 23	**JUDGMENT:** The judgment of the district court is affirmed in part, reversed in part. Remanded for further proceedings consistent with this opinion. Notice mailed. Opinion of the court by Bownes, Senior Circuit Judge
1993	
Feb. 23	Order (Torruella, Brown and Bownes) denying Petition for Rehearing. Notices mailed.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

90-198-SD

1990	
Nov. 7	Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment (Motion denied, Stahl, J., 11-7-90)
1992	
Apr. 23	Defendant's Motion to Reduce Ad Damnum to Amount in Administrative Claim (Motion not ruled on and action dismissed sua sponte, Stahl,

J., 4-23-92

Apr. 23 Judgment in accordance with Order, Stahl, J., 4-23-92

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 92-1616

PETER A. KOKARAS AND DIANE KOKARAS,
Plaintiffs, Appellants.

v.

UNITED STATES OF AMERICA
Defendants, Appellees.

JUDGMENT

Entered November 23, 1992

This cause came to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: Affirmed in part, reversed in part. Remanded for further proceedings consistent with this opinion. No costs to either party.

By the Court:

Francis P. Scigliano, Clerk

\s\ _____
By: Daniel F. Loughry,
Chief Deputy Clerk

[cc: Engel and Marzetta Lacy]

United States Court of Appeals

For the First Circuit

No. 92-1616

PETER A. KOKARAS AND DIANE KOKARAS,

Plaintiffs, Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Norman H. Stahl, U.S. District Judge]

Before

Torruella, Circuit Judge,
Brown, * Senior Circuit Judge,
Bownes, Senior Circuit Judge.

David C. Engel with whom Engel and Gearreald were on brief for appellant.

Elaine Marzetta Lacy, Assistant United States Attorney, with whom Jeffrey R. Howard, United States Attorney, was on brief for appellee.

November 23, 1992

*of the Fifth Circuit, sitting by designation.

BOWNES, Senior Circuit Judge. This is an appeal by plaintiffs-appellants Peter A. Kokaras and Diane Kokaras, spouses, from a dismissal of their complaint, brought under the Federal Torts claims Act (FTCA) for lack of subject matter jurisdiction because of the failure to file a sum-certain claim within the prescribed statutory period.

I.

On May 8, 1987, plaintiffs sustained personal injury to themselves and damage to their automobile when it was struck in the rear by a United States mail truck. On June 2, 1987, plaintiffs filed a Standard Form (SF) 95 with the Postmaster at the United States Post Office in Hampton, New Hampshire. On line 10, entitled "Amount of Claim (in Dollars)," the figure $2,906.61 was inserted in box A, entitled, "Property Damage"; in box

B, entitled, "Personal Injury," the words "to be determined" were written. Box C entitled, "Total," was left blank.[1] Line 15, entitled, "Signature of Claimant," was signed only by Peter Kokaras. Plaintiffs were not represented by counsel at the time the SF 95 was executed and filed.

In the spring of 1988, plaintiffs retained Attorney Alfred J. Cirome to represent them. This was well within the two-year statutory period for filing a tort claim with the Postal Service. 28 U.S.C. § 2401(b). No amended SF 95 was filed within the two-year period. Attorney Cirome entered into discussions, both in person and on the telephone, with agents of the Postal Service

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[1] Box C, entitled, "Wrongful death" was also left blank. It appears that plaintiffs submitted property damage documentation and some medical documentation with the original form.

in an effort to settle plaintiffs' claim. The settlement negotiations were not fruitful. During the course of the settlement discussions, Attorney Cirome turned over to the Postal Service's agents medical bills incurred by the plaintiffs along with medical diagnoses and prognoses concerning plaintiffs' injuries. Based on the record, it appears that no sum-certain demand was made either orally or in writing by Attorney Cirome.

New counsel was obtained by plaintiffs,[2] and on April 26, 1990, suit was brought against the United States under the Federal Torts Claims Act. 28 U.S.C. §§ 2671-2680. The Postal Service denied plaintiffs' claim on August 2, 1990, on the ground that it was

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[2] Attorney David C. Engel represented plaintiffs below and on appeal.

invalid, stating that "it does not inform us to [sic] any dollar amount being claimed." Three weeks prior to the Postal Service's denial of plaintiffs' claim, the United States had filed a motion to dismiss for lack of subject matter jurisdiction. The motion was predicated on the well-established rule that a timely-filed sum-certain claim is a prerequisite for jurisdiction of a tort action against the United States.[3] The district court initially denied the motion to

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The Federal Code of Regulations provides in pertinent part:

§ 14.2 Administrative claim; when presented
(a) For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident;....
28 C.F.R. §14.2 (1991) (emphasis added).

dismiss. The district judge, however, changed his mind after our decision in Corte-Real v. United States, 949 F.2d 484 (1st Cir. 19991).

II

We start our legal analysis with Corte-Real. In that case we held that the administrative claim stated a sum certain even though the personal injury box, section 10B of the SF 95, was filled out as follows: "$100,000 plus because still treating and out of work." Id. at 486. Plaintiff had completed the "Total" box, section 10D, by writing in the figure "$100,000," without qualification. Id. at 485. We held that "[w]here as here a claim clearly states a specific sum and meets the sum certain requirements in all respects but for concern over the possible detraction of improper

surplusage of this insubstantial variety, we see no reason not to strike the surplusage rather than the claim itself." Id. at 587. The following language reflects our reasoning:

We agree fully with the Government as to the importance and absolute necessity of adherence to the sum certain requirement. We disagree, however, that plaintiff's SF95, as submitted, was so deficient as to fall outside the parameters of that requirement. The SF95 did, in fact, specify a sum certain-$100,000-in both boxes, and this figure was unqualified in the box stating the total amount of the claim. To be sure, when the $100,000 appeared in Section 10(b) it was unfortunately accompanied by language suggesting the possibility of a higher claim. The Government was entitled and indeed

required, if it was to proceed with the claim, to disregard this. We think it should have done so. To throw out the claim entirely, as other than one for a sum certain, was, on these facts, bureaucratic overkill. Id. at 486.

With respect to the personal injury claim, however, the case before us is not one of "bureaucratic overkill." Nowhere on form SF 95 is a sum certain for the personal injuries stated. Moreover, we agree with the district court that any documentation of personal injury submitted was "disorganized and confusing." Some of the bills submitted are duplicates, others are incomplete, and others reflect the balance due after insurance payments. This presentation did not lend itself to determination of a sum

certain or even an approximate total of damages claimed.

Although negotiations ensued between plaintiffs' attorney and agents of the Postal Service, there is no evidence in the record that a sum certain was ever stated orally or in writing by plaintiffs' attorney. Moreover, the affidavits of Attorney Cirome and Postal Agent Dumont are in conflict. Cirome states that Dumont represented to him on more than one occasion, including on May 5, 1989, at which time Cirome attests he submitted medical reports and bills, that the plaintiffs' claims had been satisfactorily presented. Postal Service Agent Dumont states, by contrast, that he never advised the plaintiffs or their representative that the claims were satisfactorily presented. More importantly, Agent Dumont attests:

> Plaintiffs' August 7, 1990 submission to the court includes numerous documents which the plaintiffs never submitted to the Postal Service with their administrative claim. These new documents were provided to the Postal Service for the first time on August 29, 1990.

Because the accident happened on May 8, 1987, any bills submitted to the Postal Service in 1990 would be well beyond the two-year limit for filing administrative claims.

This court has consistently held that a timely-presented claim stating a sum certain is necessary for a court to have jurisdiction to entertain a suit against the United States under the FTCA. Corte-Real v. United States, 949 F.2d at 485-86; Gonzalez-Bernal vs. United States, 907 F.2d 246, 248 (1st Cir.

1990); Lopez v. United States, 758 F.2d 806, 809 (1st Cir. 1985). The rule is the same in other circuits. Cizek v. United States, 953 F.2d 1232, 1234 (10th Cir. 1992); Adkins v. United States, 896 F.2d 1324, 1325 (11th Cir. 1990); Montoya v. United States, 841 F.2d 102, 105 (5th Cir. 1988); GAF Corp v. United States, 818 F.2d 901, 919 (D.C. Cir. 1987); Erxleben v. United States, 668 F.2d 268, 272 (7th Cir. 1981); Caton vs. United States, 495 F.2d 635, 638 (9th Cir. 1974); Bialowas v. United States, 443 F.2d 1047, 1049 (3rd Cir. 1971).

The Fifth Circuit has taken a broad view as to what constitutes the statement of a sum certain. In Molinar v. United States, 515 F.2d 246, 259 (5th Cir. 1975), it held that the total bills submitted fulfilled the sum-certain requirement. And in Williams vs.

United States, 693 F.2d 555, 558 (5th Cir. 1982), it held that the itemized claim for damages as set forth in the state court complaint would be taken together with the administrative claim form to meet the notice requirements of the FTCA. But even if we followed the lead of the Fifth Circuit in regard to the personal injuries claim, not enough medical information was timely submitted to come anywhere near meeting the sum-certain jurisdictional requirement. The personal injuries claims submitted by plaintiffs can be characterized as the Tenth Circuit did in Cizek v. United States, in which the plaintiff/appellant did not present a claim containing a statement of a sum certain of the damages sought, which would have allowed the government to make even a reasonable estimate of the value of [his]

claim, until after the limitations period had run. 953 F.2d at 1234. We hold that the district court did not have jurisdiction to entertain the plaintiffs' personal injury claims.

It does not necessarily follow, however, that the extinguishment of the personal injury claims also erases the property damage claim. We believe that the plaintiffs' property damage claim is severable and that plaintiffs satisfactorily presented a sum certain with respect to their property damage claim. At the time they originally filed their SF 95, plaintiffs set forth the specific sum of $2,906.61 in the box entitled, "Property Damage." Accompanying the SF 95 was a corroborating repair estimate. Although the repair estimate was somewhat lower than the sum certain stated,

it included the name and address of the company which made the estimate. This information was sufficient for purposes of investigation. Unlike the personal injury claim, the government had the information it needed to assess plaintiffs' property claim from the date plaintiffs filed their SF 95 form. Moreover, we note that prior to the district court's issuance of its opinion, the government had moved "to reduce the Ad damnum claimed in this action from $500,000 to the amount set forth in the administrative claim of $2,906.61." This was a tacit admission by the government that the property damage claim met the sum-certain jurisdictional requirement.

We believe that the district court went too far in discarding the property damage claim along with the personal injury claim.

Our decision in Corte-Real supports saving a claim that is flawed, where the government's investigatory needs are satisfied. Indeed, dismissing plaintiffs' certain and unwavering claim for property damages would be criticized in Corte-Real. Because the sum-certain requirement was met for the property damage claim, we hold that plaintiffs are entitled to proceed on that claim. The limit on recovery, if there is one, is the amount stated, $2,906.61.

Affirmed in part, reversed in part. Remanded for further proceedings consistent with this opinion.

No costs to either party.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 92-1616

PETER A. KOKARAS AND DIANE KOKARAS,
Plaintiffs, Appellants.

v.

UNITED STATES OF AMERICA
Defendants, Appellees.

Before

Torruella, Circuit Judge,
Brown*, Senior Circuit Judge
and Bownes, Senior Circuit Judge.

ORDER OF COURT

Entered: February 23, 1993

Upon consideration of appellants' petition for rehearing.

It is ordered that said petition be denied.

By the Court,

\s\ _____
Francis P. Scigliano

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* Of the Fifth Circuit, sitting by designation

[cc: Messrs. Engel and Lacy.]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Peter A. Kokaras;
Diane Kokaras

v. Civil Action No. 90-198-S

United States of America

J U D G M E N T

In accordance with the ORDER dated April 23, 1992 by Judge Norman H. Stahl, judgment is hereby entered.

By the Court,

\s\ _____
James R. Starr, Clerk

April 28, 1992

cc: David C. Engel, Esq.
Elaine Lacy, AUSA

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Peter A. Kokaras;
Diane Kokaras

v. Civil Action No. 90-198-S

United States of America

O R D E R

In this civil action, plaintiffs Peter and Diane Kokaras sue the United States for damages arising out of an automobile accident involving their car and a vehicle driven by a United States Postal Service Employee. The action is brought pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et. seq., with jurisdiction being grounded upon 28 U.S.C. §1346(B). Currently before the Court is the United States' motion to reduce ad damnum to amount claimed in plaintiffs' administrative claim.

1. Procedural History

The accident underlying this litigation occurred on May 8, 1987, in Seabrook, New Hampshire. On June 2, 1987, plaintiffs filed a Standard Form ("SF") 95 with the Hampton, New Hampshire, Post Office.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Peter A. Kokaras;
Diane Kokaras

v. Civil Action No. 90-198-S

United States of America

O R D E R

In this civil action, plaintiffs Peter and Diane Kokaras sue the United States for damages arising out of an automobile accident involving their car and a vehicle driven by a United States Postal Service Employee. The action is brought pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq., with jurisdiction being grounded upon 28 U.S.C. §1346(b). Currently before the Court is the United States' motion to reduce ad damnum to amount claimed in plaintiffs' administrative claim.

1. Procedural History

The accident underlying this litigation occurred on May 8, 1987, in Seabrook, New Hampshire. On June 2, 1987, plaintiffs filed a Standard Form ("SF") 95 with the Hampton, New Hampshire, Post Office.[1] On that form, plaintiffs alleged that they had incurred property damage in the amount of $ 2,906.61. In the space provided for personal injury, the words "to be determined" were inscribed. Finally, the box in which the total amount of claim was to be entered was left blank. Apparently, plaintiffs attached certain documents relating to medical, property, and special damages to their SF 95.[2]

A reproduction of the SF 95 submitted by plaintiffs can be found in this Court's November 7, 1990, Order at p. 4.

There is a dispute as to whether all the documents now before the Court actually were submitted to the Postal Service. See Declaration of Henry Dumont, Area Accident Investigator, at 2.

Plaintiffs also evidently submitted additional documentation regarding such damages within the two-year period provided for bringing a claim. See 28 U.S.C. § 2401(B)[3]

In the spring of 1988, plaintiffs retained Alfred J. Cirome, Esq., to represent them in their attempt to resolve their claim against the Postal Service. Attorney Cirome and Area Accident Investigator Dumont, see note 2, supra, "had several telephonic and personal discussions . . . during the course of [Attorney Cirome's] representation of Mr. and Mrs. Kokaras between the spring of 1988 and the winter of 1990 in an effort to try to settle the claims of Mr. and Mrs. Kokaras[.]" See Affidavit of Alfred J. Cirome at 2-3.

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[3] For a detailed recitation of the administrative prerequisites for bringing a claim under the FTCA, see the Court's November 7, 1990, Order at pp. 2-4.

However, no settlement agreement was reached.

On April 26, 1990, plaintiffs abandoned the administrative process[4] and initiated the instant litigation against the United States under the FTCA.[5] On August 2, 1990, the Postal Service denied plaintiffs' claim as invalid because it "does not inform us to any dollar amount being claimed." See August 2, 1990, Letter from United States Postal Service to Attorney Engel at 1.[6] At the time of the Postal Service's August 2, 1990,

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28 U.S.C. § 2675(a) allows any person asserting a claim against a federal agency to construe the agency's failure to make a final disposition of the claim within six months as a final denial entitling him/her to file suit under the FTCA.

In this action, plaintiffs are represented by David C. Engel, Esq.

In so doing, the Postal Service implicitly asserted that plaintiffs had not properly "presented" their claim, see 28 U.S.C. § 2675(a), because the claim for money damages was not stated in a "sum certain." See 28 C.F.R. § 14.2(a) (defining "presentation" under 28 U.S.C. §2675).

denial of plaintiffs' claim, a motion to dismiss the case for lack of subject matter jurisdiction filed by the United States had been pending for three weeks. The United States' motion was grounded upon the well-settled rule that the presentment of a written, timely claim stating a sum certain to the agency is a prerequisite to a federal court's jurisdiction to entertain a suit against the United States under the FTCA. See, e.g., Corte-Real v. United States, 949 F.2d 484, 485-86 (1st Cir. 1991)(citations omitted); see generally Adams v. United States, 615 F.2d 284, 291-92 n.15 (5th Cir. 1980) (explaining how the courts have traveled different routes to the uniform conclusion that a claimant need have placed a dollar amount on his/her damages at the administrative level in order to maintain a civil action under the FTCA).

On November 7, 1990, this Court denied the United States' motion to dismiss. In so doing, it took note of the varying degrees of liberality with which other circuits construe the presentment requirement. Compare, e.g., Cizek v. United States, 953 F.2d 1232, 1234 (10th Cir. 1992) (holding that motorist's filing of a state court action against a Forest Service employee was not adequate to establish sum certain where she had failed to claim damages in a sum certain on her SF 95) with Williams v. United States, 693 F.2d 555, 558 (5th Cir. 1982) (holding that claim for damages in state court action could be taken together with SF 95 to meet sum certain requirement for purposes of FTCA).[7] Citing legislative history that it believed supported an expansive construction of the

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[7] At the time the Court issued its Order, no particularly pertinent First Circuit authority existed on this issue.

presentment requirement, the Court decided, under the facts of this case, that plaintiffs had sufficiently apprised Postal Service personnel of their claim for jurisdiction to attach in this action. See November 7, 1990, Order at 9.[8] On January 2, 1991, the Court denied the United States' motion for reconsideration of the November 7, 1990, Order.

On October 2, 1991, however, the First Circuit handed down its decision in Corte-Real, supra, 949 F.2d at 484. In that case, the court held that plaintiff's administrative claim against the General Services Administration ("GSA") stated a sum certain and was properly presented to the agency despite the fact that plaintiff had written "$100,000 plus because still treating

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[8] The Court notes that its November 7, 1990, Order did not specifically address whether plaintiffs had indeed stated a sum certain.

and out of work" in the personal injury space on his SF 95. Id. at 486. A careful reading of Corte-Real compels this Court to reverse its ruling that it has subject matter jurisdiction over the instant litigation.[9]

2. Discussion

As noted above, Corte-Real involved a situation where a claimant under the FTCA used qualifying language in the personal injury space on his SF 95. More specifically, the claimant completed the amount of claim sections of his SF 95 in the following manner:

A. PROPERTY DAMAGE --"NONE"

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9 Because the Court's subject matter jurisdiction is implicated by the holding in Corte-Real, the Court is obliged to raise the issue sua sponte. See Insurance Corp. of Ireland, Ltd. v. Campagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982); Phillips v. General Services Admin., 924 F.2d 1577, 1579 (Fed. Cir. 1991).

B. PERSONAL INJURY --$100,000 plus because still treating and out of work

C. WRONGFUL DEATH -- "NONE"

D. TOTAL -- "$100,000.00"

See id. at 489 (claimant's SF 95 attached to opinion as Appendix A). On appeal, the First Circuit was asked to determine whether the district court had been correct in dismissing claimant's FTCA action because claimant had, in the district court's view, failed to present the appropriate administrative agency with a timely claim for a sum certain. In vacating, the Corte-Real court struck the qualifying language as surplusage and found that the SF 95 sufficiently presented the GSA with a sum certain claim for the district court to exercise jurisdiction over claimant's FTCA suit. Id. at 487-88.

Although the result in Corte-Real might seem to endorse a liberal approach to the

presentment requirement in this jurisdiction, a careful reading of the reasoning employed reveals the inadequacy of plaintiffs' presentment in the instant action. The Corte-Real court began its analysis by stating its full agreement with the Government "as to the importance and absolute necessity of adherence to the sum certain requirement." Id. at 486. Noting that the purpose of the sum certain requirement is "to give notice to the Government 'sufficient to allow it to investigate the alleged negligent episode to determine if settlement would be in the best interests of all[,]'" id. (citations omitted), the court nevertheless reiterated its previous observation that such requirement "was 'not intended to put up a barrier of technicalities to defeat the claims of individuals wishing to sue the Government.'" Id. (citations omitted). The

court then proceeded to a fact-based analysis which persuaded it that claimant's SF 95 "stated a sum certain with sufficient clarity to satisfy the statutory objectives of Section 2675 and the applicable regulations." Id.

Central to the court's conclusion that the statutory and regulatory objectives inherent in the sum requirement were met was the fact that claimant had stated a clear and unequivocal total claim to the GSA See id. (Notwithstanding the inappropriate gloss in the "PERSONAL INJURY" box, plaintiff gave his total damages as $100,000 in the "TOTAL" box. The request for a total . . . can most logically be understood as asking for the bottom line amount a claimant is seeking from the United States.") (emphasis in original); see also ids. at 487 (citing with approval Erxleben vs. United States, 668 F.2d 268 (7th

Cir. 1981), a case in which the court allowed claimant's FTCA action to proceed despite fact that qualifying language was used in personal injury space where definite amount was entered on SF 95 under box entitled "TOTAL"). Moreover, the court explicitly distinguished its facts from those in Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971). See id. at 488. Bialowas involved a situation, much like the one before this Court, where specific property damage entry was made upon the SF 95 and a medical bill was attached to the SF 95 but no total claim was indicated. In Bialowas, the Third Circuit held that plaintiff had not presented the Government with a sum certain and upheld the trial court's dismissal.

Bialowas, 443 .2d at 1050.[10]

In the instant case, however, the record makes apparent that plaintiffs did not present the Government with anything resembling a total claim within two years of

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[10] In reaching its conclusion that the open-ended language in the personal injury box should be struck as surplusage, the court also referenced cases where the total amount claimed was accompanied by qualifying language. See id. (citing Martinez v. United States, 728 F.2d 694, 697 (5th Cir. 1984) and Adams by Adams v. United States Dep't of Housing and Urban Dev., 807 .2d 318, 321 (2d Cir. 1986)). In so doing, however, the First Circuit utilized language which, at minimum, causes this Court to question whether any equivocation in the total amount claimed would be viewed as permissible in this jurisdiction. See Corte-Real, 949 F.2d at 487 (stating, in its description of Martinez, that "the fifth Circuit went so far as to hold that a claim for damages 'in excess of 100,000' is in reasonable compliance with the sum certain requirement" and qualifying its reliance on Martinez, Erxleben, and Adams by Adams with the statement: "We need not endorse the result in each of these cases in order to find that the present submission was adequate to meet the sum certain requirement, given, in particular, the unqualified $100,000 in the 'TOTAL' box.") (emphasis supplied)

the accident.[11] As noted earlier, the only definite figure which was submitted to the Government was the $2,906.61" written in the space for property damage. No figure even estimating the amount of plaintiffs' personal injuries and other damages was presented to the Postal Service.[12] Nor, obviously, was a

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11 Plaintiffs' complaint admits as much. See Complaint at paragraph 12 ("On June 2, 1987, pursuant to 39 CFR §912.4 and 28 USC §2675, Plaintiff filed an administrative claim in an undetermined sum with the Postmaster of the Hampton ranch.").

12 The Court notes that the medical information that allegedly was submitted to the Postal Service cannot, in this case, be viewed as providing the requisite notice. Practically speaking, the documentation is disorganized and confusing. Indeed, careful review of those items that appear to be bills reveals that many are for identical medical services but merely were sent to plaintiffs both before and after the provider received insurance payments. At any rate, this Court would be hard pressed to come up with an accurate total of plaintiffs' relevant medical expenses based upon the documentation before it.

Even if it were able to generate an accurate number from the records before it, however, the Court finds that such number would deviate so substantially from the true

figure characterizing plaintiffs' total damages sent to the Postal Service. As such, in light of the Corte-Real court's emphasis on adhering to the sum certain requirement and providing the Government with notice of at least a ballpark estimate of the total amount of damages being claimed, the Court finds that it lacks the jurisdiction to

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nature of plaintiffs' claim (i.e. the $500,000.00 sought in the complaint) that it would not have adequately apprised the Postal Service of the amount plaintiffs were seeking. Cf. Cizek, 953 2d at 1234 noting that the wide disparity between the amount sought in timely request for reimbursement by claimant's insurer and the amount eventually requested by claimant in untimely attorney's letter provides basis for rejecting claimant's argument that the requested reimbursement should satisfy the sum certain requirement); Bradley vs. United States by Veterans Admin., 951 F.2d 268, 271 (10th Cir. 1991) (indicating that the wide variation between the qualified amount claimed in a timely sent attorney's letter and the amount eventually requested in an untimely SF 95 undermined claimant's argument that the figure in the attorney's letter adequately apprised the Government of the amount claimant was seeking.

entertain plaintiffs' claim under the FTCA.[13]

3. Conclusion

For the reasons hereinstated, the Court finds that plaintiffs did not present the Postal Service with a total claim of damages in a sum certain. Accordingly, the Court must reverse its previous ruling and dismiss this action for lack of subject matter jurisdiction. See Rule 12(b)(1), Fed. R. Civ. P. In making this ruling, however, the Court feels obliged to make certain observations. First, the Court regrets that the SF 95 in use at the time plaintiffs filed their claim did not explicitly emphasize the importance of meeting the sum certain requirement. Second, the Court can only

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[13] The Court's conclusion is supported by the fact that the record is devoid of even an allegation that a particular total claim, in a sum certain, had been implicitly presented to the Postal Service.

express its disappointment that apparently neither the Postal Service investigator with whom plaintiffs sought to resolve their claim nor the attorney plaintiffs initially retained was adequately aware of the deficiency of plaintiffs' SF 95 and/or the requirements of the FTCA.[14] Nonetheless, the Court cannot act where it does not have jurisdiction, and lawmakers have determined that the policies underlying the sum certain requirement are important enough to warrant making the requirement a jurisdictional prerequisite. Thus, this Court simply cannot reach the merits of plaintiffs' claim.

Obviously, defendant United States' motion to reduce ad damnum to amount claimed in

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[14] The Court can only assume that if the Postal Service investigator had been aware of plaintiffs' failure to state a sum certain and the ramifications thereof, fundamental fairness would have dictated that he apprise plaintiffs of this problem.

plaintiffs' administrative claim [document no. 21] is mooted by operation of this Order.

SO ORDERED.

\s_____
Norman H. Stahl
United States District Judge

April 23, 1992

cc: David C. Engel, Esq.
Elaine Lacy, Esq. (AUSA)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Peter A. Kokaras;
Diane Kokaras

v. Civil Action No. 90-198-S

United States of America

O R D E R

Plaintiffs Peter and Diane Kokaras allege that on May 8, 1987, in Hampton, New Hampshire, a United States Postal Service employee negligently caused a collision with their car. Plaintiffs seek recovery for damages to their car and for injuries to the driver (Peter Kokaras) and the passenger (Diane Kokaras). Additionally, both claimants seek damages for loss of consortium resulting from their injuries.

Before the Court is the defendant's motion to dismiss, or in the alternative, for summary judgment. The United States argues

that it is entitled to dismissal or summary judgment because plaintiffs have not exhausted their administrative remedies as required by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2671, et. seq. Jurisdiction is governed by 28 U.S.C. §1346(b).[1]

Discussion

It has long been established that the United States is entitled to sovereign immunity from tort claims. In enacting the

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[1] 28 U.S.C. §1346(b) provides: "Subject to the provisions of chapter 171 of this title, the district courts... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages...for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

FTCA, Congress waived that sovereign immunity under certain specific circumstances. United States v. Kubrick, 444 U.S. 111, 117-118 (1979). Under the FTCA, claimants must exhaust the appropriate administrative remedies. The FTCA specifically provides: An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal Agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make a final disposition of a claim within six months

after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for the purposes of this section.

28 U.S.C. §2675(a).

Under the circumstances of this case, plaintiffs were required to present the Hampton, New Hampshire Post Office with an "executed standard form 95 or other written notification of [the] incident, accompanied by a claim for money damages in a sum certain" for their personal injuries and property loss. 28 C.F.R. §14.2(a).[2] Failure

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28 C.F.R. §14.2(a) provides: "For the purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority

to execute a standard form within two years forever bars the claim. 28 U.S.C. §2401(b)[3] Satisfaction of the administrative exhaustion requirement is jurisdictional and cannot waived. Richmond v. United States, 709 F.2d 122, 124 (1st Cir. 1983). If the agency denied the claim or fails to act on the claim within six months, suit may be filed in federal court. 28 U.S.C. §2401(b), 2675(a).

On June 2, 1987, plaintiffs submitted a

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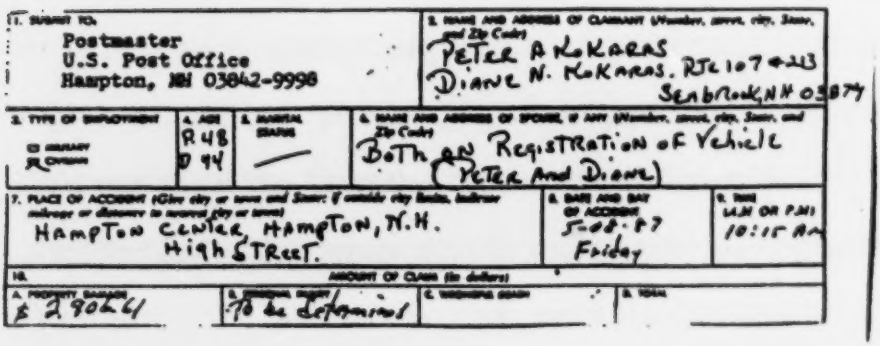
to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative." Some circuits have held that this administration regulation cannot be applied to define the jurisdiction of a federal court. See GAF Corp. vs. United States, 818 F.2d 901, 920 (D.C. Cir. 1987) (and cases cited therein)

3 28 U.S.C. §2401(b) provides: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing by certified or registered mail, or notice of final denial of the claim by the agency to which it was presented."

form 95 to the Hampton, New Hampshire Post Office. The relevant part of that form is reproduced below.



1. SUBMIT TO: Postmaster U.S. Post Office Hampton, NH 03842-9998

2. NAME AND ADDRESS OF CLAIMANT (Number, street, city, State, and Zip Code): PETER A KOKARAS DIANE N. KOKARAS. RT 107 #213 SEABROOK, NH 03874

3. TYPE OF EMPLOYMENT: ☐ MILITARY ☒ CIVILIAN

4. AGE: R 48 D 44

5. MARITAL STATUS: —

6. NAME AND ADDRESS OF SPOUSE, IF ANY (Number, street, city, State, and Zip Code): BOTH ON REGISTRATION OF VEHICLE (PETER And DIANE)

7. PLACE OF ACCIDENT (Give city or town and State. If outside city limits, indicate nearest city or town): HAMPTON CENTER, HAMPTON, N.H. High STREET.

8. DATE AND DAY OF ACCIDENT: 5-08-87 Friday

9. TIME (A.M. OR P.M.): 10:15 AM

10. AMOUNT OF CLAIM (In dollars)

A. PROPERTY DAMAGE: $ 2,902.41

B. PERSONAL INJURY/WRONGFUL DEATH: To be determined

C. WITNESSING DOGS:

D. TOTAL:

Only Mr. Kokaras' signature appears on the form 95. There is conflicting evidence whether he or his attorney ever submitted medical reports and bills or other information pertaining to the claim within the two year statutory period.

1. Claim Asserted by Peter Kokaras

The government contends that this form 95

did not satisfy the regulatory standards because it fails to state a sum certain. In the government's view, the form is flawed because (1) "to be determined" was entered for the amount of claim pertaining to personal injury, and (2) there is no indication of the total amount of the claim. Therefore, the government argues, plaintiffs did not satisfy the requirements of 28 U.S.C. §2675(a) as governed by 28 C.F.R. 14.2(a) and the Court lacks jurisdiction over plaintiff's complaint.

The administrative filing provision of 28 U.S.C. §2675(a) requires that a claim be "presented" to the appropriate federal agency as a jurisdictional prerequisite to commencement of suit. See Gaf Corp. v. United States, 818 F.2d 901, 917-923 (D.C. Cir. 1987) (and cases cited therein). Courts are divided, however, over what exactly must

be presented to satisfy this requirement.

Noting that the Supreme Court has "long decided that limitations and conditions upon which the government consents to be sued must be strictly observed and exceptions thereto are not to be implied, "the District Court of Massachusetts found that a form 95 that identified the amount of property damage as "Approx. $2,050.00", and personal injury as "not less than...$250,000", and failed to specify "total" damages, failed to satisfy the administrative presentment requirement. Casey v. United States Postal Service, 613 F. Supp. 362, 363-364 (D.C. Mass. 1985) (resulting in dismissal of the plaintiff's complaint) (citing Soriano v. United States, 352 U.S. 270, 276 (1957)). Similarly the Sixth Circuit dismissed an FTCA claim where the plaintiff left the spaces for "personal injury" and "total" on the form 95 blank.

Allen vs. United States, 517 F.2d 1328 (1975). The Allen court held that the standard form 95 submitted by the plaintiff could not be considered a valid claim because of the failure to state a demand for a sum certain on the form in accordance with 28 C.F.R. §14.2(a). Id., at 1329-1330. See also, Bialowas v. United States, 443 F.2d. 1047 (3rd Cir. 971); Jordan v. United States, 333 F. Supp. 987, 989-90 (E.D. Pa. 1971), aff'd, 474 F.2d 1340 (3rd Cir. 1973).

Other courts construe the administrative presentment requirement more liberally. In Williams v. United States, 693 F.2d 555 (5th Cir. 1983), the plaintiff did not indicate any amount sought for personal injuries or a total amount claimed on his form 95. Id. at 556. However, since the plaintiff's attorney sent a letter to the Postal Service detailing the personal and property damages sought by

the plaintiff, the court held that the notice requirements of the FTCA were fulfilled. Id. The Williams Court refused to dismiss the action even though the attorney's letter was sent after the two year statute of limitations had run. Id. See also, Molinar v. United States, 482 F. Supp. 1126 (W.D. Pa. 1980); Knapp v. United States, 844 F.2d 376, 379 (6th Cir. 1988) (a claimant who fails to comply with the presentment regulations loses the opportunity to settle outside the courts, not the right to sue.

Relevant legislative history supports a liberal construction of the exhaustion requirement. Congress had two main purposes in enacting §2675(a) of the FTCA. First, Congress sought to "ease court congestion and avoid unnecessary litigation, while making it possible for the government to expedite the fair settlement of tort claims asserted

against the United States." S. Rep. No. 1327, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Admin. News 2515-2516. Second, Congress wanted to provide "fair and equitable treatment of private individuals and claimants when they deal with the government or are involved in litigation with the government." Id. The dominant theme of §2675(a), therefore, is to apprise the agency involved in the activity which gave rise to the claim so that fair settlement can be effectuated if warranted. See GAF Corp. v. United States, 818 F.2d 901, 919 (D.C. Cir. 1987) ("Congress repeatedly characterized presentment as a simple requirement of notice.") In Lopez v. United States, 758 F.2d 806 (1985), the First Circuit stated, "The claims process is meant largely to furnish notice to the government sufficient to allow it to investigate the alleged

negligent episode to determine if settlement would be in the best interests of all." Id., at 810. Moreover, it seems fair to conclude that the FTCA is "intended to provide a framework conducive to the administrative settlement of claims, not to provide a basis for a regulatory checklist which, when not fully observed, permits the termination of claims regardless of their merits." Erxleben v. United States, 668 F.2d 268, 273 (7th Cir. 1981) (quoting Koziol v. United States, 507 F. Supp. 87, 92 (N.D. Ill. 1981)).

Defendant's position is also undermined by the fact that federal regulations do not require the form 95 to be used at all since "other written notification of an incident, accompanied by a claim for damages in a sum certain" will suffice for compliance with §2675(a). 28 C.F.R. §14.2(a).

In this case, the Court finds that

Hampton, New Hampshire Post Office personnel were fully apprised of Mr. Kokaras' claim. A May 3, 1988 letter from the Hampton Postmaster to Mr. Kokaras' attorney states that all estimates and bills associated with the May 8, 1987 accident were turned over to a postal investigator and that he had met with Mr. Kokaras on several occasions in attempts to resolve the case. Exhibit to Plaintiff's Answer to Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment.

Moreover, there is no indication that the government in any way notified Mr. Kokaras that the "sum certain" requirement was not met until August 2, 1990 after the present lawsuit was filed and after the statutory period had run. Like Lopez, supra, this is not a case where the claimant "spurned the government's repeated requests for more

information after the claim form had been filed." 758 F.2d at 810. No administrative purpose would be served by requiring an obviously inflated "sum certain" where there could be honest uncertainty as to the amount of the claim when it was filed. The Hampton Postmaster's May 3, 1988 letter indicates negotiations were at least initiated and hence the purposes of the FTCA were fulfilled in this case.

Accordingly, the defendant's motion to dismiss, or in the alternative, for summary judgment as it pertains to Peter Kokaras' claim is denied.

2. Claim Asserted by Diane Kokaras

The government also contends that even though Diane Kokaras' name is included on the form 95, she is barred from now suing the government since she did not sign the form 95

since the form 95 presented to the Hampton, New Hampshire, Post Office fails to state a sum certain, and since the form contains no description of her claim. The government argues that "the law is clear: Each person asserting a claim must file his own separate administrative claim as a prerequisite to jurisdiction." Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment at 7.

This Court finds no such requirement in the applicable law. Both Peter and Diane Kokaras' names appear as claimants on the form 95. Both of their ages are listed. The government should have had notice that Diane Kokaras was a claimant since Mr. Kokaras made specific references to his wife on the form. Albert W. Sullivan, Senior Attorney for the Postal Service has stated in declaration and letters to plaintiff's counsel that he

reviewed the claims of Peter Kokaras and Diane Kokaras. The government cannot complain of any unfair surprise-- the promotion of fair settlement was not hindered by including both Peter Kokaras and Diane Kokaras on one claim. See Casey v. United States, 635 F. Supp. 221, 225-226 (D. Mass. 1986). Moreover, 28 C.F.R. §14.3 allows one's agent to file a claim on his or her behalf.[4]

Most of the authority on which the government relies is distinguishable since the spouse in those cases was not even listed as a claimant on the administrative form.

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[4] 28 C.F.R. §14.3 provides that a claim for injury to or loss of property may be presented by the owner of the property or his duly authorized agent or legal representative and that a claim for personal injury may be presented by the injured person, his duly authorized agent, or legal representative. 28 C.F.R. §14.2 requires some evidence of authority to present a claim on behalf of another, but in this case that authority is self evident.

See e.g., Johnson v. United States, 704 F.2d 1431, 1442 (9th Cir. 1983); Collins v. GMC, 101 FRD 1 (W.D. Pa. 1982). This Court and other courts in this jurisdiction have held that when the spouse is specifically identified as a claimant on the form 95, the presentment requirement is fulfilled. See Hardiman v. United States, No. 88-279-D, slip op. (D.N.H. Feb. 1989); Case v. United States, 635 F. Supp. 221 (D. Mass. 1986).

Accordingly, the defendant's motion to dismiss, or in the alternative, for summary judgment (document no. 9) is denied.

SO ORDERED.

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Norman J. Stahl
United States District Judge

November 7, 1990

cc: David C. Engel, Esq.
U.S. Attorney